No. 87-1823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL, M. MARSHALL HAPPER III AND PHILIPPE CHATRIER,
Petitioners,

v.

VOLVO NORTH AMERICA CORPORATION, INTERNATIONAL MERCHANDISING CORPORATION AND PROSERV, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review a factual determination, based on the record in this particular case, that the facts surrounding the dismissal of respondents' complaint sufficiently demonstrate serious, perhaps irreparable consequences so as to allow an immediate appeal under 28 U.S.C. § 1292(a)(1) and *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981).

RULE 28.1 STATEMENT

The following are parents, subsidiaries (except wholly owned subsidiaries) or affiliates of respondent International Merchandising Corporation:

International Management, Inc.
IMG Developments Limited
Cleveland Eventos Esportivas, Ltda.
Pier House Press Limited
Europea (Life & Pensions) Limited
Classical Productions (UK) Limited
Adam IMG Limited

The following are parents, subsidiaries (except wholly owned subsidiaries) or affiliates of respondent ProServ, Inc.:

ProServ Television, Inc.
ProServ Europe, S.A.

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BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

The Court of Appeals in this case made a factual determination that, as a result of the dismissal of their antitrust complaint, respondents would suffer serious, perhaps irreparable, consequences such that the District Court's order could be effectively challenged only by an immediate appeal pursuant to 28 U.S.C. § 1292(a)(1).

Petitioners ask this Court to review that factual determination.

Respondents respectfully submit that this Court should not grant a writ of certiorari to review the interlocutory ruling of the Court of Appeals because: (1) even assuming that there is a conflict among the circuits regarding the proper interpretation of *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), the Second Circuit's decision was based upon specific factual findings which would support an immediate appeal under any interpretation of *Carson*; and (2) contrary to petitioners' assertions, the Second Circuit's application of *Carson* to the facts of this case is not in conflict with the rule applied in other circuits.

I. THE SECOND CIRCUIT'S DECISION WAS A FACTUAL DETERMINATION WHICH WOULD SUPPORT AN APPEAL EVEN IF A DIFFERENT INTERPRETATION OF *CARSON* HAD BEEN APPLIED.

Petitioners recognize that, under this Court's decision in *Carson*, an appeal lies under 28 U.S.C. § 1292(a)(1) from an order having the "practical effect" of denying an injunction if the order has a "serious, perhaps irreparable, consequence" and can be " 'effectually challenged' only by immediate appeal." 450 U.S. at 84. This rule is followed in every case cited by petitioners.[1] Petitioners

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[1] *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1142-43 (1988); *Woodard v. Sage Products, Inc.*, 818 F.2d 841, 850 (Fed. Cir. 1987) (*en banc*); *Sims Varner & Assoc., Inc. v. Blanchard*, 794 F.2d 1123, 1126 (6th Cir. 1986); *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1237-38 (7th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986); *Shanks v. City of Dallas*, 752 F.2d 1092, 1096 (5th Cir. 1985); *South Bend Consumers Club, Inc. v. United Consumers Club, Inc.*, 742 F.2d 392, 393-94 (7th Cir. 1984); *Center for Nat'l Sec. Studies v. CIA*, 711 F.2d 409, 413 (D.C. Cir. 1983); *Commodity Futures Trading Comm'n v. Preferred Capital Inv. Co.*, 664 F.2d 1316, 1319 (5th Cir. 1982); *Gould v. Control Laser Corp.*,

further concede that the order of the District Court, which dismissed with prejudice all of the claims of respondents ProServ, Inc. and International Merchandising Corporation, had the "practical effect" of denying them the injunctive relief they sought. Petitioners contend, however, that the Court of Appeals found respondents' appeal proper based upon a holding, which they contend conflicts with the rule in other circuits, that dismissal of a complaint seeking injunctive relief always permits an immediate appeal. Petition at 2.

Petitioners fail to recognize, however, that in addition to discussing the general effect of dismissal of a complaint in the abstract, the Court of Appeals made the precise finding contemplated by *Carson* based upon "consideration of the affidavits" submitted by respondents in opposition to the motion to dismiss the appeal:

> In view of the pervasive influence of MIPTC over men's professional tennis tournaments, [respondents] argue convincingly that if review of their dismissed antitrust claims is deferred until the conclusion of the potentially protracted litigation pending below, these restrictions [imposed by petitioners upon respondents' business] are likely to have a serious and irreparable impact upon their ability to compete with MIPTC in the conduct of men's professional tennis tournaments, and that the order dismissing their antitrust claims can therefore be effectually challenged only by an immediate appeal. Not only, therefore, are the general standards articulated in *General Electric* [*Co. v. Marvel Rare Metals Co.*, 287 U.S. 430 (1932)] and reiterated in *Carson* met here; *there is also a persuasive showing of specific and irreparable harm* which will result from a failure to

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650 F.2d 617, 621 (5th Cir. 1981); *Plymouth County Nuclear Information Comm., Inc. v. Boston Edison Co.*, 655 F.2d 15, 17 (1st Cir. 1981); *Roberts v. St. Regis Paper Co.*, 653 F.2d 166, 170 (5th Cir. 1981); *Shirey v. Bensalem Township*, 663 F.2d 472, 475 (3d Cir. 1981).

> exercise appellate jurisdiction at this juncture, which is likely to render ineffectual any relief that might result from an appeal from a final judgment in the litigation pending below.

Volvo North America Corp. v. Men's International Professional Tennis Council, 839 F.2d 69, 76 (2d Cir. 1988) (emphasis supplied).[2]

Contrary to petitioners' assertion, therefore, this is not a precedent-setting case of general applicability. Rather, applying *Carson* and *General Electric*, and considering the evidence before it of the particular circumstances in this case, the Court of Appeals properly made the factual determination that respondents had established the sort of "serious, perhaps, irreparable consequence" that will permit an immediate appeal.[3] Whether or not the

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[2] Petitioners err in suggesting that the Court of Appeals' holding that respondents had made a sufficient showing of irreparable injury was dicta. Petition at 14 n.8. "It does not make a reason given for a conclusion in a case *obiter dictum*, that it is only one of two reasons for the same conclusion." *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928). *See also Massachusetts* v. *United States*, 333 U.S. 611, 623 (1948); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924).

[3] Citing *Woodard v. Sage Products, Inc.*, 818 F.2d 841 (Fed. Cir. 1987) (*en banc*), petitioners complain that the Second Circuit's consideration of affidavits submitted by respondents on the issue of irreparable harm was improper. Petition at 14 n.8. While *Woodard* notes the "advisability of at least first proceeding with a motion under Fed. R. Civ. P. 54(b)" to establish a record of irreparable harm, *Woodard*, 818 F.2d 854, respondents were precluded from creating a factual record in that manner, and petitioners' assertions that respondents sought a Rule 54(b) certification "without attempting to develop any factual record of harm," Petition at 23 n.10, is incorrect. In fact, the record before the Court of Appeals showed that respondents' counsel had telephoned the District Judge's chambers to schedule a time to be heard on a Rule 54(b) motion. A law clerk responded that the District Judge would not grant Rule 54(b) certification, even though the motion had not been formally presented or argued. Under these circumstances, it would obviously

circuit courts disagree upon the precise weight to be accorded the fact that the order appealed from dismissed a complaint on the merits, the result in this case would be the same in *any* circuit, and this case is therefore inappropriate for review by this Court.

This Court, of course, rarely reviews factual findings of lower courts. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). For example, in *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923), this Court was asked to overrule a decision of the Second Circuit refusing to stay its mandate pending certiorari. This Court declined to do so, noting that "[i]t is clear that the Circuit Court of Appeals gave full consideration to a similar motion and with a much fuller knowledge than we can have, denied it. As we have said, we require very cogent reasons before we will disregard the deliberate action of that court in such a manner." 262 U.S. at 164. Since the usual practice of this Court is to "accord great weight to a finding of fact" made by a lower court, there is no need for this Court to grant a writ of certiorari to review the factual determination in this case. *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *see also Rogers v. Lodge*, 458 U.S. 613 (1982).

In any event, petitioners do not set forth any basis for this Court to overturn the Court of Appeals' factual finding of irreparable harm. Petitioners suggest only that the respondents' decision not to seek preliminary injunctive relief precludes a finding of irreparable harm.

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have been futile to file a formal motion in the District Court. Declaration of Robert S. Litt, filed October 15, 1987, reprinted in the appendix to this brief at A-1.

In any event, petitioners do not seek review of the question of whether the Court of Appeals considered appropriate evidence, which is surely not worthy of this Court's attention.

Yet none of the cases cited by petitioners supports such a proposition; they merely indicate that the failure to seek preliminary injunctive relief is one factor to be considered in determining whether irreparable harm exists. *Shirey v. Bensalem Township*, 663 F.2d 472, 476 (3d Cir. 1981) ("Thus, one of the factors which the Court has considered significant . . . is whether the party has sought preliminary injunctive relief"); *see also Woodard v. Sage Products, Inc.*, 818 F.2d 841, 852 (Fed. Cir. 1987); *Plymouth County Nuclear Information Comm., Inc. v. Boston Edison Co.*, 655 F.2d 15, 18 (1st Cir. 1981). The Second Circuit, in accord with every other circuit, explicitly considered the fact that respondents had not requested preliminary injunctive relief, but, based on the record before it, decided "we cannot conclude that [respondents'] failure to seek preliminary injunctive relief below should bar this appeal." 839 F.2d at 75. Again, this fact specific conclusion presents no issue of general importance worthy of review by this Court.[4]

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[4] Moreover, the opinion which petitioners seek to have reviewed is an interlocutory one; while the merits of the appeal have been fully briefed and argued, no final decision has yet been made by the Court of Appeals. It is well settled that this Court "should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent *extraordinary inconvenience and embarrassment* in the conduct of the cause." *American Constr. Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893) (emphasis supplied). Indeed, if the decree sought to be reviewed is not a final one, "that of itself alone furnish[es] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Brotherhood of Locomotive Firemen v. Bangor & A. R.R.*, 389 U.S. 327, 328 (1967); Sup. Ct. R. 18 (writ of certiorari to review case pending in court of appeals before judgment granted only upon a showing of such imperative public importance as to justify deviation from normal practice and to require immediate settlement in the Supreme Court). Petitioners cannot make a showing of "extraordinary" circumstances in this case which would warrant immediate Supreme Court review of this interlocutory decision.

II. THE SECOND CIRCUIT'S DECISION APPLYING *CARSON* CONFORMS WITH THE DECISIONS OF OTHER CIRCUITS.

Petitioners assert that this case and a case from the District of Columbia Circuit, *Center for National Security Studies v. CIA*, 711 F.2d 409 (D.C. Cir. 1983) are "in conflict with the decisions of three other circuit courts . . . ." Petition at 8. Specifically, petitioners assert that the court below held "that the mere fact that a dismissed complaint requested *permanent* injunctive relief, *by itself*, presents a 'serious, perhaps irreparable, consequence' that can only be 'effectually challenged' by immediate appeal" and therefore its decision is "in direct conflict with other circuit courts of appeals . . . ." Petition at 2. Neither of these assertions is supported by the opinion of the Court of Appeals, whose approach was consistent with the approach taken by other Courts of Appeals.

On the one hand, the Second Circuit announced no such inflexible rule of automatic appealability. Following this Court's decision in *General Electric*, it merely noted that in this particular case, the dismissal of the complaint entirely precluded respondents' claims for injunctive relief in a major antitrust case that might last several more years before final judgment. Its conclusion that these circumstances presented irreparable injury sufficient to support an immediate appeal was "fortified" by the specific factual showing made by respondents and discussed above. Similarly, the District of Columbia Circuit, in *Center for National Security Studies v. CIA*, 711 F.2d 409 (D.C. Cir. 1983), held only that on the facts presented, no irreparable injury had been shown. Thus, these cases in no way deviate from this Court's decision in *Carson*.[5]

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[5] Petitioners' concern that as a result of the Second Circuit's decision, "the caseload of the appellate courts may increase dra-

On the other hand, the First, Third and Federal Circuits, which petitioners claim are in conflict with the decision below, are entirely consistent with it. The Third Circuit, for example, has specifically noted that an appeal can be taken under 28 U.S.C. § 1292(a)(1) when an order dismissing part of a case "prevents the plaintiff from obtaining the full injunctive relief requested, or effectively denies relief altogether. . . ." *Presinzano v. Hoffman-LaRoche, Inc.*, 726 F.2d 105, 109 (3d Cir. 1984).[6] The First Circuit, in the very case cited by petitioners, noted that "[i]nterlocutory orders striking claims for injunctive relief entered early in the course of litigation, will often satisfy [the *Carson*] test, since the foreclosure of relief *pendente lite* may have an immediate, and potentially serious, impact of the sort justifying immediate appeal." *Plymouth County Nuclear Information Comm., Inc. v. Boston Edison Co.*, 655 F.2d 15, 17 (1st Cir. 1981). And the Federal Circuit, in *Woodard v. Sage Products, Inc.*, 818 F.2d 841 (Fed. Cir. 1987)

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matically," Petition at 9, is unfounded. In the half century between *General Electric* and *Carson*, appeals were permitted in the Second Circuit under § 1292(a)(1) whenever the trial court dismissed, on the merits, a claim for injunctive relief. *See Williams v. Wallace Silversmiths, Inc.*, 566 F.2d 364, 366-67 (2d Cir. 1977). Yet respondents have found only five reported opinions in the Second Circuit in which appeals were properly taken on such basis. *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 618 F.2d 950 (2d Cir. 1980); *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 461 F.2d 1040 (2d Cir. 1972); *Build of Buffalo, Inc. v. Sedita*, 441 F.2d 284 (2d Cir. 1971); *Langevin v. Chenango Court, Inc.*, 447 F.2d 296 (2d Cir. 1971); *Stewart-Warner Corp. v. Westinghouse Electric Corp.*, 325 F.2d 822 (2d Cir. 1963), *cert. denied*, 376 U.S. 944 (1964). Certainly this does not suggest that the decision below will produce a flood of additional appeals.

[6] In view of the Third Circuit's decision in *Presinzano*, its prior decision in *Shirey v. Bensalem Township*, 663 F.2d 472 (3d Cir. 1981), upon which petitioners rely, was obviously limited to the particular facts in that case.

(*en banc*), based its denial of appellate jurisdiction on the appellants' failure to show irreparable injury in the particular case, noting that "[i]t simply does not hold true that harm *pendente lite* is present *whenever* a permanent injunction is disposed of on the merits of the claim." 818 F.2d at 852 (emphasis supplied).

There is thus no conflict among the circuits. Every court that has considered the issue has recognized that the foreclosure of injunctive relief by the dismissal of a complaint on the merits can be a factor showing irreparable injury so as to permit an immediate appeal pursuant to 28 U.S.C. § 1292(a)(1). The Second Circuit in this case considered that factor, as well as the specific facts of this case, and concluded that the respondents, as this Court held in *General Electric* and specifically reaffirmed in *Carson*, 450 U.S. at 90, had shown "serious, perhaps irreparable" injury sufficient to permit an appeal. That fact-specific conclusion, individual to this case, is unworthy of review by this Court.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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APPENDIX

DECLARATION OF ROBERT S. LITT

DISTRICT OF COLUMBIA) ss.:

ROBERT S. LITT deposes and says:

1. I am an attorney of record for appellant ProServ, Inc. I make this declaration in connection with the opposition to appellees' motion to dismiss the above-captioned appeal, to set forth more fully the circumstances surrounding the District Court's refusal to enter final judgment pursuant to Fed. R. Civ. P. 54(b).

2. On September 29, 1987, a conference was held before Staff Counsel in connection with this appeal. Thereafter, I called Judge Duffy's chambers. I told the law clerk that plaintiffs (appellants herein) wanted to make a motion requesting that the court enter final judgment pursuant to Fed. R. Civ. P. 54(b) and that if the Judge was available, all parties were present in the courthouse at that time. I was told that the Judge was on the bench, and asked to call back later.

3. I called back approximately one hour later. I was told that the court was not going to enter final judgment pursuant to Rule 54(b). No papers were filed and no argument was heard in connection with this request.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 14, 1987.

/s/ _____
ROBERT S. LITT